COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION II

CITY OF BREMERTON, Appellant, v. WEBG, LLC, Respondent.	No. 36003-9-II APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This case involves the routine enforcement of a building permit and shoreline exemption determination. Contrary to WEBG's groundless assertions, the City did not change the terms of, revoke, or rescind the building permit or shoreline exemption determination that it had issued to WEBG for the "interior remodel" of an existing restaurant. Instead, soon after receiving a building permit for an interior remodel and replacement of the roof structure of the existing building, within the shoreline exemption for "normal maintenance and repair," WEBG, without disclosure, permission, or advance notice of any kind to the City or to the Puget Sound Clean Air Agency, suddenly demolished virtually the entire structure, including much of its foundation, transforming the structure, in a few hours, into a pile of asbestos-filled rubble, as depicted in Exhibit BB in the Administrative Record (copies of three of the photos from Exhibit BB are included as Appendix 1 to this Brief). Unsurprisingly and properly, the City issued Stop Work Orders for this flagrant violation of the building permit, shoreline exemption, and City codes.

WEBG, by unlawfully demolishing the existing building, necessarily changed its project. As a result of the demolition of virtually all of the building and part of its foundation, WEBG's proposed development no longer could be the remodeling and refurbishing of an existing building, as proposed and permitted, but was transformed into the demolition of an existing building and the construction of a new building.

Because the changed project clearly violated the terms and conditions of the building permit and shoreline exemption, the City took appropriate enforcement action, by issuing Stop Work Orders. WEBG could have responded to the Stop Work Orders by acknowledging the changes in its proposed development and obtaining appropriate permits. The City has been and continues to be supportive of developing a restaurant on this large waterfront site. Or if WEBG thought that the terms and conditions of the building permit and shoreline exemption determination were unlawfully restrictive, WEBG could have challenged them in a timely Land Use Petition Act (LUPA) action. WEBG did neither. Instead, WEBG challenged the Stop Work Orders, before the Hearing Examiner and then Superior Court, contending that the demolition was in compliance with the terms and conditions of its building permit for an interior remodel of the existing building, and with its shoreline exemption for normal maintenance and repair of the existing building. WEBG also brought a damage action against the City, for stopping work on the project, that is pending in Federal District Court.

The City's Hearing Examiner correctly decided that WEBG had violated the terms and conditions of the building permit and shoreline exemption and, thus, that the Stop Work Orders were lawfully issued. The Superior Court erroneously invalidated the decision of the Hearing Examiner as well as portions of the building permit over which the Court had no jurisdiction. This Court reviews the decision of the Hearing Examiner, rather than the Superior Court, and applies the same standards

of review that the Superior Court was supposed to have applied under LUPA.

WEBG's strategy of challenging the validity of the Stop Work Orders, rather than seeking appropriate permits for its changed proposal, indicates that its primary objective is to recover damages against the City rather than build and operate a restaurant on the site. The City always has been, and continues to be, ready, willing, and able to expeditiously process appropriate permit applications for the project whenever WEBG decides to submit them.

II. ASSIGNMENTS OF ERROR

As discussed in section IV.A below, this Court directly reviews the decision of the Hearing Examiner, not the decision of the Superior Court, *HJS Development v. Pierce County*, 148 Wn.2d 451, 467-68, 61 P.3d 1141 (2003). The Superior Court's Memorandum Opinion and Order is surplusage, *Holder v. City of Vancouver*, 136 Wn. App. 104, FN2, 147 P.3d 641 (2006), and detailed assignments of error to an opinion that has no legal effect would not be meaningful. Since this Court is directly reviewing the Hearing Examiner's decision, it is the assignments of errors in the LUPA petitions filed with the Superior Court that define the scope of this Court's review. *See, Woods v. Kittitas County*, 130 Wn. App. 573, 583, 123 P.3d 883 (2005) The City is the respondent with regard to all aspects of the Hearing Examiner's decision but one.

Assignment of Error 1: The decision of the Hearing Examiner upholding the City's Stop Work Orders should be affirmed and the Superior Court's Final Order and Judgment invalidating the Stop Work Orders should be reversed because WEBG has failed to meet its burden of demonstrating that the Hearing Examiner's decision was unlawful under any of the standards of LUPA in RCW 36.70C.130(1).

Issues Pertaining to Assignment of Error 1: Should the decision of the Hearing Examiner be affirmed and the Superior Court's Judgment be reversed because the Court misapplied LUPA's standards to the Hearing Examiner's decision upholding the City's Stop Work Orders, and because WEBG failed to meet its burden of demonstrating that Hearing Examiner's decision was unlawful under any of the standards of LUPA in RCW 36.70C.130(1)?

Should the Hearing Examiner's decision upholding the City's Stop Work Orders be affirmed, with the one exception noted below, because WEBG failed to meet its burden of demonstrating that the City's action was unlawful under any of the standards of LUPA in RCW 36.70C.130(1)?

Assignment of Error 2: As stated in the City's LUPA Petition, the Hearing Examiner erred to the extent that he characterized the City's action as a revocation or rescission of the City's Shoreline Exemption determination for WEBG's proposed development.

Issue Pertaining to Assignment of Error 2: Should this element of the Hearing Examiner's decision be reversed or modified to clearly state

that the City did not revoke or rescind its Shoreline Exemption determination, but rather took proper enforcement action when demolition of the existing building and, consequently, transformation of the proposed development from a remodel of an existing building to construction of a new building, exceeded the limitations of the City's Shoreline Exemption determination?

III. STATEMENT OF THE CASE

A. Factual Background

This section provides an overview of the material facts. Additional facts in the record will be included in the Argument below.[1]

The demolished building at issue in this litigation was located at 2039 Wheaton Way in the City of Bremerton, within the shoreline of the Port Washington Narrows, on a high-bank waterfront lot with a history of instability.[2] The building had housed various restaurants over the years. However, the site suffered a landslide in 1995 and the building became vacant sometime before February 18, 1998, when the City issued a Dangerous Building Certificate[3] followed by a Notice and Order to Abate Unsafe Condition.[4] This Notice and Order stated that "landslide damage

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[1] Because this is a LUPA appeal of a quasi-judicial decision made by the City Hearing Examiner, the record on review is the Administrative Record created at the hearing before the Hearing Examiner. This Administrative Record comprises Exhibits 1 through 5; Exhibits A through NN; and a certified Transcript of the hearing. Exhibits will be referred by the abbreviation "Ex" and pages of the transcript by the abbreviation "ADR", followed by a reference to a specific exhibit or page number.

[2] Exs C & K; ADR at 61, Ln. 17-23.

[3] Ex A

[4] Ex B

has not been repaired, building is open to vagrants and vandals, windows are broken, roof is leaking, deeming this structure dangerous . . . ."

WEBG purchased the site and the structure on April 11, 2005 for $95,000,[5] and applied for a Building Permit for a "commercial remodel" on September 21, 2005.[6] The application was signed by WEBG's counsel of record, Mr. Broughton. That same day Mr. Broughton submitted a "Shoreline Permit Submittal Checklist" requesting an exemption from the requirement to obtain a shoreline substantial development permit,[7] and he also submitted an Environmental Checklist which, in section 1, identified the Project as the "Bridgetender remodel" and which, in section 11, gave the required "brief, complete description" of the proposal as "building remodel."[8] On September 29, 2005, WEBG's attorney Ken Lederman sent a letter to City Attorney Roger Lubovich "formally requesting that the City of Bremerton determine that the Project is exempt from the shoreline permitting requirements of the Shoreline Management Act (SMA) and the Bremerton Shoreline Master Program (BSMP)."[9]

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[5] Ex D
[6] Ex E
[7] Ex K
[8] Ex M
[9] Exs O & L. There are two copies of this letter in the Administrative Record. Ex O is a signed letter on the letterhead of the law firm of Riddell Williams P.S., dated September 29, 2005; Ex L is an unsigned version that is not on letterhead and that is dated July 6, 2005. Neither version of the letter bears a "date received" stamp, and there is no discussion of the discrepancy between the two versions in the Transcript. Presumably WEBG prepared its arguments regarding a shoreline exemption in July, before it submitted its applications, but delivered its arguments in the signed letter after submission of its applications.

Mr. Lederman's letter also described the Project as a "remodel," and requested that the City determine that the Project was exempt from the requirement to obtain a Shoreline Substantial Development Permit ("Shoreline Permit") under the exemption for "normal maintenance and repair" in RCW 90.58.030(3)(e), WAC 173-27-040(2), and in the Bremerton Shoreline Master Program ("BSMP") at 8-6.[10] Mr. Lederman specifically described the Project as the "remodel" and "refurbishment of a vacant building" that would "maintain the structure":

> The WEBG Group has purchased the Site and intends to ***remodel***, but not expand, the existing structure. Planned improvements include replacement of the flat roof with a conventional sloped roof, installation of sprinklers and ADA accessible amenities, and installation of a new curb, gutter sidewalk (sic), streetlights, and landscaping. All ***remodeling*** efforts will be performed in accordance with applicable codes and requirements. The ***remodel*** will retain the current footprint and foundation, and will not expand the existing structure.
>
> * * *
>
> The Project qualifies as the "***normal maintenance***" and "***normal repair***" of an existing structure, and is therefore exempt from shoreline permitting requirements. The Project will involve ***refurbishment of a vacant building*** to revive its lawful use as a restaurant in the particular development environment. And the Project will result ***maintain*** (sic) ***the structure*** to be comparable with its original size, shape, configuration location and external appearance.

(Emphasis added)

[10] A copy of the BSMP is in Appendix 2; a copy of WAC 173-27-040 is in Appendix 4.

On September 29, 2005, the City Planner reviewing the application, JoAnn Vidinhar, wrote to Mr. Broughton to notify him that the Project did not qualify for the Shoreline Exemption for normal maintenance and repair because the new pitched roof would increase the volume of the structure.[11] WEBG responded by eliminating the proposed new pitched roof and proposing instead a shed roof that would merely rebuild the existing one in its existing configuration.[12] The City then issued a Shoreline Exemption to WEBG, on November 29, 2005,[13] that described the Project as:

> 1. Remodel an existing restaurant at 2039 Wheaton Way in Bremerton. Improvements include replacing the roof in its current configuration, installation of sprinklers and ADA accessible amenities, installation of a new curb, gutter sidewalk, streetlights and landscaping.
>
> 2. Repave, top coat and re-strip an existing parking lot abutting the restaurant (Tax #3976-030-030-0005)

The City issued the Building Permit on February 9, 2006, [14] and WEBG's representatives – Mr. Wideman, the builder,[15] and Mr. Graham, the designer of the interior of the restaurant[16] – picked up the permit the same day. The Permit described the Project that the City was approving as

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[11] Ex N
[12] Exs Q & R. The exemption for "normal maintenance or repair", WAC 173-27-040, requires that a structure "remain comparable to its original condition, including but not limited to its size, shape, configuration, location and external appearance."
[13] Ex V
[14] Ex AA
[15] ADR at 90, Ln. 7-11.
[16] ADR at 116, Ln. 4-5.

an "INTERIOR REMODEL TO BLDG FOR NEW RESTAURANT CALLED "CLIFFSIDE". Paragraph 32 of the permit, which Mr. Graham initialed when he picked up the permit,[17] states:

> Development is for ***interior remodel*** of the restaurant, ***including replacing the roof in its current configuration,*** installation of sprinklers and ADA accessible amenities, installation of a new curb, gutter, sidewalk, streetlights, and landscaping. In addition development includes repaving, top-coating and restripping the existing parking lot abutting the restaurant). ***Any work outside of this scope requires additional review and approval.***

(Emphasis added). Condition 4 of the Building Permit included a requirement that WEBG, before doing any renovation or demolition, obtain an asbestos survey by an EPA-certified building inspector, in conformity with the regulations of the Puget Sound Clean Air Agency and the Washington State Department of Labor and Industries.

WEBG did not ask for additional review and approval, did not ask the City to revise these conditions, and did not appeal them. Just eight days later, on February 17, 2005, a City inspector discovered that WEBG had demolished the building except for part of the "north" wall and part of the foundation.[18] The building was demolished without required permits, without the required analysis or abatement of asbestos,[19] and without any

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[17] ADR at 122, Ln. 13.

[18] Ex BB. Three of the photographs from Exhibit BB are included as Appendix 1 to this Brief. The building faces the Port Washington Narrows and therefore is not aligned with the cardinal points of the compass: the witnesses referred to the side facing the water as the west side and the side with the partial wall remaining as the north side, e.g. ADR at 77, 94, & 105.

[19] Exhibit LL. WEBG commissioned Skookum Abatement Services to conduct the asbestos survey on March 3, 2006, after the City issued the Stop Work Orders. The

notice to the City. That same day the City issued a Stop Work Order that described the violation as "Work being done exceeds work defined on permit."[20] Later that day the City issued a second Stop Work Order[21] that stated:

> 1. Demolition Permit required (including asbestos analysis and, if required, abatement). No further site work, including removal of remaining debris, can be conducted until Demolition Permit is issued.
>
> 2. The property owner may submit a written request for reconsideration of this Notice, including the basis for reconsideration, to Director, Department of Community Development.

In response, Mr. Broughton wrote a letter, also dated February 17, 2005, requesting that the Stop Work Orders be "removed immediately" so that WEBG could continue with its "remodel" of the "existing structure."[22] Mr. Broughton's letter asserted that "the plans and specifications clearly show our intent to remodel the structure by replacing most of its components, while preserving with reinforcement its foundation, north wall and existing footprint." The City's attorney, Carol Morris, asked Mr. Broughton if the City should treat this letter as a request for reconsideration of the Stop Work Orders, and Mr. Broughton

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executive summary of the Survey on page 3 refers to the former restaurant as a "demolition pile" and states that "The asbestos containing material is spread throughout the debris pile and would not be cost effective to attempt to separate the non asbestos from the asbestos material. Skookum recommends having the debris pile be considered as asbestos contaminated and disposed as asbestos construction debris."

[20] Ex CC

[21] Ex DD

[22] Ex FF

responded that the letter should be regarded as a request for reconsideration.[23]

In response to this request, the Department of Community Development conducted an administrative review and on March 3, 2006, the Director issued his "Director's Decision On Reconsideration" ("Director's Decision),[24] affirming the Stop Work Orders as "correctly issued under the provisions of BMC 1.04.050 (Stop Work Order) and BMC 17.04.020 (International Building Code)." The Director's Decision also concluded that the City "correctly determined that the work on the subject property exceeded the scope of the work described in the decision approving the Exemption from the Shoreline Substantial Development Permit requirement."

WEBG appealed the Director's Decision to the City's Hearing Examiner,[25] who conducted a quasi-judicial hearing on March 27, 2006. At the hearing, as described in more detail below, the City's witnesses testified that the work done on the site exceeded the work authorized by the Building Permit and Shoreline Exemption, as well as the work depicted in the plans, and WEBG argued that the City should have known that WEBG intended to remodel the building by demolishing it except for part of one wall and part of the foundation.

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[23] Exs. GG & HH
[24] Ex NN
[25] Ex KK

JoAnn Vidinhar, the City planner who reviewed the plans for zoning compliance, testified:

> With these descriptions and scope of work, the permit applications were reviewed as an ***interior remodel***. In filling out the permit application, the Applicant did not identify the scope of work to include demolition work.
>
> In the building permit application, structure demolition was not checked and in the environmental checklist question 8.D, which states, "***Will any structure be demolished***," the Applicant answered "***None***."[26]

(Emphasis added) Mr. Broughton, who participated in the hearing as the attorney for WEBG rather than as a witness, questioned Ms. Vidinhar about where the restriction to an "interior" remodel came from:

> Q. (Mr. BROUGHTON) And was – that determination to insert the word "interior," was that based upon a review by you of the plans and specifications for the work to be performed?
>
> A. Not by the plans and specifications totally. It was by the scope of work that was provided by you.[27]

James Svensson, the City's Development Manager and Building Official, testified that he and Ms. Vidinhar personally visited the site on February 17, 2006, when the Stop Work Order was issued, and took the photographs that constitute Exhibit BB:

> Q. (Ms. MORRIS) And could you explain to us what they depict, please?

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[26] ADR at 25, Ln. 22-25 and at 26, Ln. 2-5. WEBG's application is Ex E and its SEPA checklist is Ex M.
[27] ADR at 38, Ln. 17-18.

A. They indicate that the building had been essentially demolished with the exception of a small section of wall on the north side and portions of the foundation.[28]

Mr. Broughton tried to persuade the witness that the plans depicted a "virtual rebuilding" of the structure but Mr. Svensson did not agree:

Q. (Mr. BROUGHTON) Okay. It is clear from that set of plans and specifications that were submitted that the project anticipated by WEBG was going to be a virtual rebuilding of the entire structure; isn't that true?

A. No, not in my opinion.[29]

Larry Craze, the City's plans examiner and building inspector, similarly testified about how the work done on the site exceeded the work depicted on the approved plans.

Q. (Ms. MORRIS) So, in summary, would you say these plans are consistent or inconsistent with what you saw on-site and Mr. Broughton's representation that this was going to be a remodel? . . .

A. No, these plans are not consistent with what is going on at the site currently.[30]

Appellant's case consisted of the testimony of David D. Wideman, the owner of Big Sky Builders, and Andy Graham, the designer of the interior of the restaurant.[31] Mr. Wideman testified regarding what he thought WEBG's engineer meant by various notations on the plans. However, the plans were prepared by WEBG's engineering firm, Kitsap

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[28] ADR at 44, Ln. 8-10.
[29] ADR at 49, Ln. 21.
[30] ADR at 68, Ln. 23-24.
[31] ADR at 89, Ln. 14-15 and at 116, Ln. 4-5.

Consulting Engineer, Inc.,[32] and no representative of WEBG's engineering firm testified.

Mr. Wideman also testified that, as he interpreted the plans, they showed WEBG's intent to rebuild most of the structure.[33] However, the plain language of the notations on the plans contradicted Mr. Wideman's testimony, and the engineer who drafted the plans was not called by WEBG to testify.

Mr. Wideman testified that only a portion of the existing north wall was to remain, but the plans clearly indicated, in commonly used abbreviations, that the entire existing south and east walls also were to remain, along with their existing foundations (footings). The plan notations, "EX. CMU WALL TO REMAIN" and "EX. FTG TO REMAIN", meaning "existing concrete masonry unit wall to remain" and "existing footing to remain" clearly are indicated in the plan to apply not only to the north wall, but also the south and east walls.[34] The walls and footings on Exhibit H, Sheet 1 to which these notations refer are clearly indicated by the attachment of the notations to a dashed line for the footing and a solid line with cross marks (that looks like barbed wire) for the walls. These notations and the portions of the plan to which they are attached illustrate that not only the north wall, where WEBG's witnesses said the plans showed that a portion of the wall would remain, *but also the*

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[32] Ex H

[33] ADR at 96, Ln. 22-25 and 97.

[34] Ex H, Sheet 1; ADR at 65 & 86-87. See also Ex. H, Sheet 2 which is referenced in the testimony at ADR 86-87.

south and east walls were to remain in the remodel. The photographs in Exhibit BB clearly and indisputably show that these south and east walls have been reduced to a pile of rubble, as have the eastern-most and western-most portions of the north wall.

In other words, the plans say that the existing footings and concrete masonry block wall are "to remain" around three-quarters of the building: all of the south and east walls, and all but the western-most section of the north wall. Mr. Wideman's testimony and WEBG's demolition were contrary to the plain meaning of WEBG's own plans.

The Hearing Examiner, on the basis of the substantial evidence summarized above, found and concluded that the work performed by WEBG exceeded the scope of work authorized by the Building Permit and the Shoreline Exemption for normal maintenance and repair.[35]

The Hearing Examiner also found and concluded that the building had lost its status as a lawful nonconforming structure because it was being repaired or replaced at a cost that would exceed 75% of the replacement cost of the structure.[36]

WEBG, when it filed its LUPA petition, did not assign error to any of the Hearing Examiner's findings or conclusions.[37]

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[35] Ex 1, particularly at pages 10-11 and 14

[36] Ex 1 at 11 & 14. When a nonconforming building must be repaired or replaced at a cost that exceeds 75% of the replacement cost of the building, it is deemed to be "substantially destroyed" and the replacement or repair must comply with the City's current regulations. BMC 20.54.040(d) and 20.54.070(c). This issue is discussed in section E.1 below, and copies of these code sections are included in as Appendix 3 to this Brief.

[37] CP at 39-46

B. Procedural Background

On November 29, 2005, the City issued a Shoreline Exemption to WEBG, and on February 9, 2006, the City issued a Building Permit to WEBG.[38] On February 17, 2006, the City issued two Stop Work Orders,[39] and the same day WEBG asked for reconsideration.[40] The Director of Community Development conducted an administrative review, and on March 3, 2006, he issued his "Director's Decision On Reconsideration" ("Director's Decision), affirming the issuance of the Stop Work Orders and concluding that the City had correctly determined that WEBG's work exceeded the scope of the work permitted by the Building Permit and the Exemption the City had issued from the requirement to obtain a Shoreline Substantial Development Permit."[41]

WEBG appealed the Director's Decision to the City's Hearing Examiner, who conducted a quasi-judicial hearing on March 27, 2006, and issued his "FINDINGS, CONCLUSIONS and DECISION" ("Hearing Examiner's Decision") on April 10, 2006, affirming the Director's Decision.[42]

On April 13, 2006, the City's attorney, Carol Morris, submitted a letter asking the Hearing Examiner to correct certain errors in the decision, and requesting that he reconsider the wording of his decision so that it no

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[38] Exs V & AA
[39] Exs CC & DD
[40] Exs FF, GG & HH
[41] Ex NN
[42] Ex 1

longer characterized the City's actions as having rescinded or revoked WEBG's Shoreline Exemption.[43]

On April 26, 2006 the Hearing Examiner issued his REQUEST FOR RECONSIDERATION in response to Ms. Morris's April 13, 2006 letter, modifying his decision in minor ways and deciding that "The City's actions have effectively rescinded the Appellant's exemption from the requirement to obtain a SSDP" (Shoreline Substantial Development Permit).[44]

On May 15, 2006, WEBG appealed the Hearing Examiner's Decision, as modified, to Superior Court pursuant to the Land Use Petition Act,[45] and the City cross-appealed[46] on May 18, 2006, asking the superior court to modify the Hearing Examiner's decision to clarify that the City had not rescinded or revoked WEBG's Shoreline Exemption. The case was assigned to visiting judge Craddock D. Verser of the Jefferson County Superior Court.

On November 8, 2006, WEBG noted a MOTION TO AMEND LUPA PETITION, to be heard at the hearing on the Petition scheduled for November 17, 2006.[47] The City filed its objection to this motion on November 16, 2006.[48] The Court orally granted the motion to amend at

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[43] Ms. Morris' letter is not in the administrative record but its content is discussed in the Hearing Examiner's response, Ex 2.
[44] Ex 2 at pg 3
[45] CP 39
[46] CP 1
[47] CP 219
[48] CP 266

the hearing on November 17, 2006,[49] and on the same day WEGB filed its "AMENDED LAND USE PETITION & COMPLAINT FOR DAMAGES."[50] In this Amended Complaint WEBG sought damages against the City pursuant to five new causes of action: for violation of RCW 64.40.020; for arbitrary and capricious action in violation of WEBG's statutory and constitutional rights; for negligence; for violation of WEBG's substantive and procedural due process rights; and for inverse condemnation of WEBG's property rights.

The Superior Court heard argument in the LUPA action on November 17, 2006.[51] On November 22, 2006, the City filed notices that it had removed the case to Federal Court.[52] The City and WEBG then entered into a STIPULATION AND ORDER TO REMAND LUPA PETITIONS AND TO STAY PROCEEDINGS, and on January 4, 2007, the United States District Court entered this Order, staying action on WEBG's damage claims in Federal Court "until after the Kitsap County Superior Court has issued a decision on the LUPA petitions."[53]

On February 6, 2007, Judge Verser issued his "MEMORANDUM OPINION AND ORDER", reversing the Hearing Examiner's Decision that upheld the City's Stop Work orders.[54] The Court did not address the City's cross-appeal of the Hearing Examiner's characterization of the

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[49] CP 280
[50] CP 271
[51] CP 280
[52] CP 283
[53] CP 285
[54] CP 290

City's action as a rescission or revocation of the Shoreline Exemption for WEBG's proposed project.

The City filed its Notice of Appeal of the Superior Court's decision on February 27, 2007.[55] On March 23, 2007 Judge Verser signed a "FINAL ORDER AND JUDGMENT" presented by WEBG which denied the City's LUPA petition and granted WEBG's LUPA petition "in accordance with the Court's Memorandum Opinion and Order."[56]

IV. ARGUMENT

A. This Court Directly Reviews The Decision Of The City's Hearing Examiner, Not The Appellate Decision Made By The Superior Court

The City of Bremerton is the Appellant in this case, but WEBG bears the burdens of proof and persuasion in this Court pursuant to the standards of the Land Use Petition Act, Chapter 36.70C RCW. This is because the City of Bremerton prevailed before the City's Hearing Examiner, and it was WEBG that petitioned the superior court to review the Hearing Examiner's decision, where WEBG had the burden of demonstrating that the Hearing Examiner's decision violated one of the standards in RCW 36.70C.130(1).[57] Because the superior court acted in

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[55] CP 299

[56] CP 309

[57] "(1) The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW 36.70C.120. The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

an appellate capacity when it reviewed the Hearing Examiner's decision, this Court directly reviews the decision of the Hearing Examiner, not the memorandum decision of the superior court, which is disregarded as surplusage. *Holder v. City of Vancouver*, 136 Wn. App. 104, FN2, 147 P.3d 641 (2006).

> When reviewing a land use decision, we stand in the same position as the superior court and review the administrative record that was before the Board. *Pavlina v. City of Vancouver*, 122 Wash. App. 520, 525, 94 P.3d 366 (2004); *Citizens for Responsible & Organized Planning v. Chelan County*, 105 Wash. App. 753, 758, 21 P.3d 304 (2001).

HJS Development v. Pierce County, 148 Wn.2d 451, 467-68, 61 P.3d 1141 (2003).

The City prevailed before the Hearing Examiner, and, therefore, the facts must be construed in favor of the City, so that it is WEBG's burden to demonstrate that the Hearing Examiner's decision is not supported by substantial evidence:

> "Substantial evidence" is evidence sufficient to convince an unprejudiced, rational person that a finding is true. *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wash.2d 740, 751-52, 49 P.3d 867 (2002). On review, we weigh all inferences in a light most favorable to the party that prevailed in the highest forum that exercised fact-finding authority. *Freeburg*, 71 Wash. App. at 371-72, 859 P.2d 610 (citing *State ex rel. Lige & Wm. B. Dickson*

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief."

> *Co. v. County of Pierce*, 65 Wash.App. 614, 618, 829 P.2d 217, review denied, 120 Wash.2d 1008, 841 P.2d 47 (1992)). Thurston County prevailed at the Department hearing, the highest forum with fact-finding authority, and thus we view all evidence and reasonable inferences in its favor.

Griffin v. Thurston County, __ Wn. App. __, 154 P.3d 296, 299 (2007)

WEBG also has the burden of demonstrating that the Hearing Examiner's decision was "clearly erroneous" or that any of the other standards in RCW 36.70C.130(1) have been met. *Supra,* at 299.

B. Overview Of Argument:

The fundamental issue before the Hearing Examiner and this Court is whether the City lawfully issued two Stop Work orders to WEBG. The City acted properly because (1) substantial evidence demonstrates that WEBG violated the conditions of its Building Permit and Shoreline Exemption by demolishing the building; and, because of the demolition, WEBG would further violate these conditions by rebuilding the demolished structure; (2) it is too late for WEBG to challenge these conditions; (3) WEBG's actions terminated its nonconforming rights and eliminated its eligibility to proceed with construction without a new building permit and a shoreline substantial development permit; and therefore (4) the Stop Work Orders were necessary to prevent WEBG from continuing to violate the City's land use code, its building code, its Shoreline Master Program , and the State Shoreline Management Act.

The City's limited appeal of the wording of the Hearing Examiner's decision should be granted because the City did not revoke or

rescind, but instead enforced, the Shoreline Exemption (and the Building Permit), and because the Hearing Examiner's inaccurate use of these terms is relied upon by WEBG as the basis for a damage action against the City.

To have been legally accurate, the Examiner should have characterized the City's action as enforcement of the terms of the Shoreline Exemption, not a revocation of it. WEBG now needs a shoreline substantial development permit to build its new restaurant, not because the City revoked the Shoreline Exemption, but because WEBG changed its proposed development by destroying the building that the Exemption authorized it to maintain and repair. Rebuilding the demolished structure without a shoreline substantial development permit would violate not only the terms and conditions of WEBG's Shoreline Exemption for normal maintenance and repair, but also the Shoreline Management Act and the City's land use regulations for nonconforming structures.

The City appealed this element of the Hearing Examiner's decision, which the Examiner seemed to regard as merely a matter of semantics, because the accurate legal characterization of the City's actions is important for purposes of WEBG's damage action that is pending in Federal District Court.

C. By Demolishing The Building, WEBG Violated The Conditions Imposed By Both The Building Permit And The Shoreline Exemption

The testimony of the City's witnesses, and the exhibits in the record, particularly the photographs in Exhibit BB that illustrate the condition of the property when the Stop Work orders were issued, demonstrate that WEBG did not perform an interior remodel of an existing restaurant, and by demolishing the structure made it impossible to merely perform an interior remodel in accordance with the limitations of the Building Permit and Shoreline Exemption.

The Hearing Examiner found and concluded that the terms of the Building Permit and Shoreline Exemption were violated, and the photographs in Exhibit BB alone are "sufficient to convince an unprejudiced, rational person" that the Hearing Examiner was correct, particularly since all inferences from the facts must be weighed in favor of the City. *Griffin v. Thurston County*, 154 P.3d at 299. The Hearing Examiner's decision also is supported by the testimony of all three City witnesses: JoAnn Vidinhar, James Svensson, and Larry Craze.

It is undisputed that WEBG did not obtain a permit to demolish virtually the entire building and did not perform the required analysis and abatement of asbestos. The Stop Work Orders were justified on this basis alone.

The Building Permit and corresponding Shoreline Exemption determination allowed only an "interior remodel", and by the plain

language of WEBG's building plans, most of the north wall and the entire south and east walls were to remain and not be replaced. By demolishing virtually all of these walls, WEBG could not proceed with construction without building new walls and foundations that were not included in the plans and were not authorized by the Building Permit and corresponding Shoreline Exemption.

As a result of the demolition, construction of a substantially new building in place of the demolished one would violate the City's code provisions limiting the reconstruction of nonconforming structures because the new building would cost more than 75% of the replacement cost of the building that WEBG destroyed. BMC 20.54.040(d) and 20.54.070(c).[58] The Stop Work Orders were justified to prevent violation of these code provisions.

D. It Is Far Too Late For WEBG To Challenge The Conditions Of The Building Permit And Shoreline Exemption That It Violated

1. The Conditions Reflect WEBG's Representations To The City

WEBG applied for a Building Permit for a "commercial remodel" and "commercial repair"[59], and for a Shoreline Exemption to "remodel, but not expand, the existing structure.[60] Its SEPA checklist described the project as a "building remodel."[61] WEBG's attorney stated that it was

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[58] See the discussion in footnote 36 and the copies of these code provisions Appendix 3.
[59] Ex E
[60] Ex O
[61] Ex M

entitled to the Shoreline Exemption because WEBG would be performing "normal maintenance" and "normal repair". He also asserted that WEBG's project would be the "refurbishment of a vacant building to revive its lawful use", and that WEBG would "maintain the structure".[62] In its SEPA checklist WEBG also indicated that its proposal would not entail any demolition.[63]

The City reviewed the plans and issued the Shoreline Exemption and Building Permit in light of these representations by WEBG. The Shoreline Exemption states that it is an exemption to "[r]emodel an existing restaurant":[64] and the Building Permit, in a section that WEBG's representative initialed when he picked up the Permit, states that it is a permit for an "interior remodel".[65] This same section of the Building Permit also states that "[a]ny work outside of this scope requires additional review and approval."

2. WEBG Failed To Appeal The Conditions In The Building Permit And Shoreline Exemption And Therefore Is Bound By Them

A decision to issue a building permit is a land use decision subject to appeal pursuant to LUPA. *Chelan County v. Nykreim*, 146 Wn.2d 904, 929, 52 P.3d 1 (2002); *Asche v. Bloomquist*, 132 Wn. App. 784, 790-91, 133 P.3d 475 (2006). Similarly, a local government's decision that a project is exempt from the permitting requirements of the Shoreline

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[62] Ex O
[63] Ex M, pg 8; ADR at 26, Ln. 2-5.
[64] Ex V
[65] Ex AA at section 32

Management Act, Chapter 90.58 RCW, is a decision that must be appealed to superior court rather than to the Shorelines Hearings Board. RCW 90.58.180; *Samuel's Furniture, Inc. v. State*, 147 Wn.2d 440, 448-49, 54 P.3d 1194 (2003); *Toandos Peninsula Ass'n v. Jefferson County*, 32 Wn. App. 473, 485, 648 P.2d 448 (1982).[66]

WEBG did not bring a LUPA appeal, or any other action, to challenge the conditions in the Building Permit and Shoreline Exemption that limited the scope of its work to an interior remodel of an existing restaurant, and these conditions therefore became final and binding on WEBG 21 days after the Building Permit was issued:

> A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court and timely served . . . .:

RCW 36.70C.040.

> LUPA's stated purpose is "timely judicial review." RCW 36.70C.010. It establishes a uniform 21-day deadline for appealing the final decisions of local land use authorities and is intended to prevent parties from delaying judicial review at the conclusion of the local administrative process. As we have recently interpreted LUPA in *Wenatchee Sportsmen, Chelan County v. Nykreim,* 146 Wash.2d 904, 52 P.3d 1 (2002), and *Samuel's Furniture, Inc. v. Department of Ecology,* 147 Wash.2d 440, 54 P.3d 1194, 63 P.3d 764 (2002), once a party has

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[66] The Shoreline Exemption in this case, standing alone, would not have been appealable pursuant to LUPA because it was not a "final determination" on "[a]n application for a project permit . . . ." RCW 36.70C.020(1). LUPA does not allow interlocutory appeals. *Pacific Rock Environmental Enhancement Group v. Clark County*, 92 Wn. App. 777, 781-82, 964 P.2d 1211 (1998). In order to appeal the limitation in the Exemption, WEBG could have either combined an appeal of the Exemption with a LUPA appeal of the Building Permit, or sought interlocutory review of the Exemption under a constitutional writ of certiorari or other extraordinary remedy. *Supra, FN3.*

> had a chance to challenge a land use decision and exhaust all appropriate administrative remedies, a land use decision becomes unreviewable by the courts if not appealed to superior court within LUPA's specified timeline. *See, e.g., Wenatchee Sportsmen,* 141 Wash.2d at 181, 4 P.3d 123 ("Because [LUPA] prevents a court from reviewing a petition that is untimely, approval of the rezone became valid once the opportunity to challenge it passed."); *Nykreim,* 146 Wash.2d at 925, 940, 52 P.3d 1.

Habitat Watch v. Skagit County, 155 Wn.2d 397, 406-07, 120 P.3d 56 (2005).

WEBG acknowledged the finality of the Building Permit and Shoreline Exemption in the LUPA petition that it filed with the Superior Court, where it explicitly characterized these approvals as "valid, legitimate and appropriately issued":

> 7.4 The permits issued by the City of Bremerton on November 29, 2005 and February 9, 2006, were not appealed by any party. The time to appeal those permits under LUPA has expired.[67]

After the City issued the Stop Work Orders because of WEBG's violation of their terms, WEBG appealed these Stop Work Orders to the Hearing Examiner. The issue before the Hearing Examiner was whether the Stop Work Orders were properly issued, that is, whether WEBG's conduct violated the terms and conditions of the Building Permit and the Shoreline Exemption. WEBG did not bring a LUPA appeal or any other action in superior court to challenge the terms and conditions of the Building Permit and Shoreline Exemption limiting the scope of its project,

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[67] CP 44

even though the 21-day period for bringing such a LUPA appeal or other action had not yet run at the time the Stop Work Orders were issued. The Building Permit had been issued and picked-up by WEBG's representatives on February 9, 2006[68] and the Stop Work Orders had been issued eight days later on February 17, 2006.

By the time the Hearing Examiner heard WEBG's appeal, on March 27, 2006, however, it was too late for WEBG to challenge the limitations in the Building Permit and Shoreline Exemption because the 21-day LUPA appeal period expired March 2, 2006. The issue before the Hearing Examiner was whether WEBG had violated the limitations in the Building Permit and Shoreline Exemption, not whether these limitations were valid. WEBG was and is bound by these limitations just as surely as the petitioners in *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wash.2d 169, 4 P.3d 123 (2000), *Nykreim*, *supra*, and *Habitat Watch, supra,* and many other cases were bound by the limitations and decisions that they failed to timely appeal pursuant to LUPA.[69]

Since the validity of the Building Permit and Shoreline Exemption were not subject to review by the Hearing Examiner, they also were not subject to review by the Superior Court in WEBG's subsequent appeal of

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[68] Exs AA, CC & DD

[69] In *Wenatchee Sportsmen* the petitioners failed to bring a timely LUPA appeal of a site-specific rezone and therefore were barred from collaterally challenging the validity of the rezone in a later challenge to a subdivision based upon the rezone; in *Nykreim* the County failed to timely appeal its decision to grant a boundary line adjustment; and in *Habitat Watch* the petitioners were barred from challenging the renewal of special use permit by their failure to bring a timely LUPA challenge to the renewal.

the Hearing Examiner's decision.[70] The only issue properly before the Hearing Examiner was whether WEBG's work violated the limitations in the Building Permit and Shoreline Exemption, and that is the only issue raised by WEBG's LUPA appeal.[71]

E. WEBG's Actions Terminated Its Nonconforming Rights And Eliminated Its Eligibility To Proceed With Construction Without A Shoreline Substantial Development Permit

1. WEBG's Actions Terminated Its Right To Remodel A Nonconforming Building

The Building Permit limited WEBG's project to an interior remodel, not only because WEBG applied for a permit for a remodel, but also because, as the City's planner, JoAnn Vidinhar testified, the building that WEBG demolished was a nonconforming structure:

> A. . . . The proposed use as a restaurant was a conforming use; however, the building did not meet the required buffer setback to the slope pursuant to the City's critical areas ordinance, thus, the structure itself was non-conforming. This limited development to a remodel or repair within the current building envelope. To build a new conforming restaurant, the Applicant would need to move the building further away from the bluff to meet the shoreline critical areas and zoning code setbacks.[72]

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[70] The Superior Court's Memorandum Opinion and Order", CP 290, demonstrates that it failed to understand this basic fact of the case: see, for example, page 9 where the Court purported to void certain unspecified conditions of the Building Permit.

[71] The Hearing Examiner also found and concluded that the Permit Conditions reflected WEBG's plans as well as its representations to the City, and although this issue is irrelevant since WEBG would be bound by the conditions even if they had been imposed in error, *Nykreim*, *supra*, at 931-33, the Hearing Examiner's decision on this issue is supported by substantial evidence. See the discussion of the record in section III.A above.

[72] ADR at 26, Ln. 16-25.

The City's code states that when a nonconforming structure experiences "substantial destruction" it:

> . . . shall be considered discontinued and have its nonconforming status terminated. Any subsequent repair or reconstruction of the structure shall comply with the requirements of the zone.

BMC 20.54.070(c). "Substantial destruction" is defined in BMC 20.54.040(d) to mean:

> . . . the repair or replacement of a building or structure which exceeds seventy-five (75) percent of the replacement cost of the entire building, excluding the foundations.[73]

The Hearing Examiner,[74] in Finding of Fact 5, found that on April 11, 2005, WEBG purchased the property for $95,000, and that in 2005 the property was assessed at $180,460. In Finding 9 the Hearing Examiner found that "the application noted that the fair market value of the project was $350,000 but the accompanying letter states that the "project will provide $1 million in improvements to the building." The Hearing Examiner then concluded, on page 11 of his Decision, that these amounts are "well in excess of 75% of the market value, whether that value is defined by the actually (sic) purchase price or the assessed value." The Hearing Examiner's findings and conclusions are based upon undisputed evidence, and WEBG did not assign error in its LUPA petition to any of the Hearing Examiner's findings or conclusions. By its actions,

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[73] Copies of these code sections are in the appendix.
[74] Ex 1

WEBG not only demolished its building, it also destroyed its nonconforming rights in the building.

a. Because WEBG's Actions Destroyed The Building It Was Authorized To Maintain Or Repair, A Shoreline Substantial Development Permit Would Be Required For The New Construction

The Shoreline Exemption limited the scope of WEBG's work to the " interior remodel [of] an existing restaurant", not only because WEBG told the City it intended to remodel the existing restaurant, but also because a shoreline substantial development permit would have been required for WEBG's work if it was not limited to the maintenance or repair of the existing restaurant.

The Shoreline Management Act, RCW 90.58.140(2), prohibits "substantial development" on the shorelines of the state unless a substantial development permit first is obtained from the local government with jurisdiction over the property. There is no dispute that the subject property is within the jurisdiction of the Shoreline Management Act on the Port Washington Narrows, and there is no dispute that construction of a restaurant constitutes "substantial development" as defined in RCW 90.58.030(3)(e). A shoreline substantial development permit therefore was required for WEBG's work unless that work fit within one of the narrow exemptions authorized by the Department of Ecology in WAC 173-27-040:

> Exemptions shall be construed narrowly. Only those developments that meet the precise terms of one or more of

> the listed exemptions may be granted exemption from the substantial development permit process.

WAC 173-27-040(1)(a).[75] WEBG was well aware of the requirements of the Shoreline Management Act because it had its attorney send a letter to the City,[76] a week after it applied for its Building Permit, arguing that its proposed work to "remodel" and "refurbish" the "vacant building" fit within the narrowly construed exemption in WAC 173-27-040(2)(b) for "normal maintenance or repair of existing structures":

> (b) Normal maintenance or repair of existing structures or developments, including damage by accident, fire or elements. "Normal maintenance" includes those usual acts to prevent a decline, lapse, or cessation from a lawfully established condition. "Normal repair" means to restore a development to a state comparable to its original condition, including but not limited to its size, shape, configuration, location and external appearance, within a reasonable period after decay or partial destruction, except where repair causes substantial adverse effects to shoreline resource or environment. Replacement of a structure or development may be authorized as repair where such replacement is the common method of repair for the type of structure or development and the replacement structure or development is comparable to the original structure or development including but not limited to its size, shape, configuration, location and external appearance and the replacement does not cause substantial adverse effects to shoreline resources or environment . . .

WAC 173-27-040(2)(b).

The City issued the Shoreline Exemption based on WEBG's representations that it was proposing a limited remodel of the existing,

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[75] The WAC rules quoted in this section are Appendix 4.
[76] Ex O

vacant building. The City later issued the Stop Work order because WEBG ignored its own representations to the City and the express limitations in the Shoreline Exemption, and demolished the existing building so that there was no longer a building to remodel (or maintain or repair). The City's witnesses testified, and Exhibit BB demonstrates, that the demolition of the existing building did not "meet the precise terms" of the exemption for "normal maintenance or repair" which the City was required to "narrowly construe". WAC 173-27-040(1)(a). The Hearing Examiner agreed, and his findings and conclusions are supported by evidence that is more than substantial.

If WEBG had honestly acknowledged on its application that it intended to demolish the restaurant, if WEBG had admitted that it was proposing to reconstruct the building after demolishing it, and if WEBG had presented arguments that replacement of the structure should be construed as a normal means of repair, the City could have evaluated the proposal and WEBG's arguments that the proposal was within the Shoreline Exemption. However, WEBG did not propose to demolish and rebuild the building, and the City's Building Permit and Shoreline Exemption were based on WEBG's representation that it was proposing to remodel and refurbish the existing, nonconforming restaurant building. Given the requirement that shoreline exemptions be narrowly construed, it is highly unlikely that the City would have granted a Shoreline Exemption for normal maintenance and repair if WEBG had revealed its true intentions. However, the Shoreline Exemption that was granted and never

challenged was limited to the remodel and refurbishment of the existing building.

Having demolished the existing restaurant, WEBG now can build a new restaurant, but only after first obtaining a shoreline substantial development permit for the new restaurant, properly located on the lot to meet current setback requirements. Given the large size of the WEBG's waterfront parcel,[77] these requirements could be easily satisfied by a proposed new restaurant structure. The City has been supportive of a restaurant on this site, but since WEBG does not have, and never has applied for, a substantial development permit, the City properly issued the Stop Work orders, and these orders properly remain in place until WEBG obtains the substantial development permit it must have to build its new restaurant.

F. The Stop Work Orders Were Necessary To Remedy Existing Violations And Prevent Additional Future Violations Of The Conditions and Terms Of The Building Permit And Shoreline Exemption, And Thereby Violations Of The City's Land Use Code, Building Code, Shoreline Master Program, And The State Shoreline Management Act.

As discussed in the preceding sections, the conditions in the Building Permit and Shoreline Exemption that together limited the scope of WEBG's project to the interior remodel of an existing restaurant, not only reflected WEBG's representations to the City, they also were necessary in order for WEBG to be allowed to proceed. Otherwise, WEBG would have had to comply with the City's current land use

[77] Ex C

regulations, including its critical areas ordinance, by building in a different location on the site, and WEBG would have had to obtain a Shoreline Substantial Development Permit for this new building in its new location.

When the City discovered that WEBG had destroyed the nonconforming building that it was supposed to be remodeling, and that it had failed to obtain an asbestos survey before doing so, and that it was not possible for WEBG to maintain and repair a building that no longer existed, and that WEBG would be constructing a new building in a place where it was not permitted, the City had no choice but to issue the Stop Work orders, not only to enforce the conditions of the Building Permit and Shoreline Exemption, but also to prevent further violations of the City Code and the State Shoreline Management Act.

G. The Language Of The Hearing Examiner's Decision Should Be Clarified To Eliminate Any Suggestion That The City Revoked Or Rescinded The Shoreline Exemption

The City filed a limited LUPA appeal of the Hearing Examiner's decision, asking the Superior Court to overrule or modify certain words chosen by the Hearing Examiner to describe the City's actions.[78] The Superior Court did not address this issue in its Memorandum Opinion and Order, but later denied the City's appeal in its Final Order and Judgment.[79] The City renews its appeal with this Court because the inaccurate language in the Hearing Examiner's decision has been seized upon by WEBG as the basis for a damage action against the City that presently is

[78] CP 1
[79] CP 290 & 309

pending in Federal District Court. (WEBG brought its damage claims in an Amended Land Use Petition & Complaint For Damages, and the City removed the action to Federal Court because WEBG sought damages under the Federal Constitution. The damage action has been stayed pending a final decision in this LUPA appeal.[80])

The Hearing Examiner's decision[81] refers to "the revocation of the shoreline exemption" on pages 8 and 14 of his decision, and to "the issuance of . . . the revocation of an Exemption" on page 14. The City asked the Hearing Examiner to reconsider this language, and the Hearing Examiner in response stated:

> The City had previously stated that the Appellant was not required to obtain a SSDP [shoreline substantial development permit], the City now states that the Appellant is required to obtain a SSDP, therefore the City's own language and actions leads (sic) the Hearing Examiner to one and only one conclusion that the Appellant's exemption is no longer valid and that the City's actions have effectively rescinded the shoreline exemption.[82]

The City did not revoke, rescind or nullify the Building Permit and Shoreline Exemption in any way. Rather, the City's action was a proper and ordinary permit enforcement action where the conduct of a permittee violates the terms and conditions of a permit or exemption. The City did not abrogate or alter the Building Permit or exemption. Rather, WEBG

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[80] CP 271, 281, 283 & 285
[81] Ex 1
[82] Ex 2, pg 3

changed its project so that it no longer conformed to the Permit and Exemption.

The Hearing Examiner failed to appreciate that the words "revocation" and "rescission", when used loosely, could have legal consequences that the Hearing Examiner did not intend. These words also do not accurately characterize the City's actions. The City, therefore, asks that the Hearing Examiner's decision on this narrow issue be overruled by striking or modifying the Examiner's legally inaccurate characterization of the City's actions, or that this Court clarify how the Examiner's language is to be interpreted.

In *Nykreim*, *supra*, 146 Wn.2d at 934, the Supreme Court held that a city or county that issues a land use decision is a person aggrieved or adversely affected by that land use decision, and the City or County therefore is precluded from revoking or rescinding that decision after LUPA's twenty-one day appeal period expires. In light of *Nykreim*, WEBG has sought to profit by the Hearing Examiner's use of the terms "revocation" and "rescission" by filing a damage action against the City that asserts that:

> . . . without having appealed the issuance of those permits [the Building Permit and Shoreline Exemption] in accordance with the provisions of LUPA, the City of Bremerton stopped work on the project and revoked the shoreline exemption and the building permit.[83]

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[83] CP 271, section 8.4

Based on this allegation of an unlawful revocation of the Building Permit and Shoreline Exemption in violation of LUPA, WEBG seeks damages that sound in negligence, the violation of RCW 64.40.020, inverse condemnation, and violations of its substantive and procedural due process rights.[84]

The facts in the record demonstrate that the City did not revoke or rescind either the Building Permit or the Shoreline Exemption. The City did just the opposite. The City enforced and therefore upheld the Building Permit and Shoreline Exemption by issuing Stop Work orders based upon WEBG's violation of the terms of those approvals. The Building Permit and Shoreline Exemption limited the scope of WEBG's work to the interior remodel of an existing restaurant, but WEBG destroyed the restaurant. A Stop Work Order based upon a developer's violation of permit conditions is not a revocation or rescission of the permit that the developer has violated: it is an enforcement action and, therefore, an affirmation of the permit.

In this case the violations are so egregious – destroying the nonconforming structure that allowed WEBG to proceed without compliance with current land use regulations and without obtaining a shoreline substantial development permit – that the Stop Work Orders must remain in place until WEBG chooses to comply with the City's current regulations and State law. That is the consequence of WEBG's

[84] CP 271, sections 9.1 through 13.5

actions, not the City's. The Stop Work Orders simply preserve the status quo and prevent additional violations of the City's and State's regulations.

The City requests that this Court clarify in its decision that the City enforced the Building Permit and Shoreline Exemption and did not revoke or rescind them.

V. CONCLUSION

For the past several years, under the leadership of Mayor Cary Bozeman and Congressman Norm Dicks, revitalization of the City and its economy have been the highest priorities of the City of Bremerton. Consistent with this revitalization and redevelopment campaign, the City has encouraged and supported WEBG's proposal to redevelop its waterfront property and operate a new restaurant. However, the City must comply with state and local law, no matter how eager it is to promote new development.

The City consistently was supportive of WEBG's proposal to remodel an existing building which formerly had been used as a restaurant and establish a new restaurant in the remodeled structure. Because the existing building was in the shoreline jurisdiction, a Shoreline Permit was required unless the proposed remodel was exempt from the permit requirement as "normal maintenance and repair." Because the existing building did not conform to a current set-back regulation, it also was a nonconforming structure, and the remodel was subject to specific limitations on rebuilding nonconforming structures. Thus, the

construction and development allowed by the Building Permit had to be within the limitations of the Shoreline Exemption for normal maintenance and repair and consistent with the City Code provisions regulating the rebuilding of nonconforming structures.

When WEBG, without notice to the City or permission from either the City or the Puget Sound Clean Air Agency, demolished virtually the entire building, the demolition, itself, violated City Code provisions requiring a permit, as well as requirements for asbestos analysis and abatement. These violations alone amply justified the City's Stop Work Orders and the Examiner's affirmance of the orders.

However, the applicability of the Shoreline Permit requirement to the development unless it qualified for exemption as normal maintenance and repair, and the City's Code provisions regulating the rebuilding of nonconforming structures, provided two additional, independently sufficient justifications for the Stop Work Orders. In order to comply with the Shoreline Exemption for normal maintenance and repair and the City's nonconforming structure regulations, the Building Permit authorized only the "interior remodel" of the building and replacement of the roof structure in its existing configuration, with three of the four existing walls and most of the existing foundation to remain, in accordance with the plan submitted by WEBG. The demolition of the building, except for a small part of the north wall, made it impossible for the structure to be rebuilt within the limitations of the Shoreline Exemption for normal maintenance and repair and the City's nonconforming structure regulations.

As a result of the demolition, a Shoreline Permit is required to construct the new building, and the location of the new building will have to be adjusted to satisfy current set-back regulations. Thus, the construction of the new building, as a result of the demolition of the existing building, was properly suspended by the Stop Work Orders until a Shoreline Permit is obtained and the location is adjusted to satisfy current set-back requirements. The Examiner properly upheld the City's Stop Work orders for these reasons, as well.

WEBG could have sought and still can seek the appropriate permits for a new building on the site, and the City stands ready to expeditiously process such applications. If WEBG disagreed with the terms and conditions of the Building Permit and Shoreline Exemption, they could have been challenged in a timely LUPA action. WEBG declined to do so. Instead, WEBG appealed the Stop Work Orders, arguing that its demolition and proposed reconstruction of the building did not violate the terms and conditions of the Building Permit and Shoreline Exemption. Because, as explained in detail, above, WEBG's demolition of the old building and intended construction of a new building clearly violated the Building Permit and Shoreline Exemption, the City asks this Court to affirm the decision of the Hearing Examiner upholding the Stop Work Orders and reverse the decision of the Superior Court.

Regarding the City's appeal of the Hearing Examiner's characterization of the City's Stop Work Orders as revocation or rescission of its Shoreline Exemption Determination, the City asks the

Court to modify or clarify the Examiner's characterization. The City did not revoke, rescind, or modify its Shoreline Exemption determination in any way. The City merely enforced the limitations of the Shoreline Exemption by stopping work on a project that no longer was consistent with what was originally approved and no longer was within the exemption for normal maintenance and repair. As previously explained, the City asks the Court to modify the language characterizing the City's actions because of its potential importance in a damage action by WEBG against the City that is pending in Federal District Court.

SUBMITTED this 11th day of May, 2007.

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APPENDIX 1

APPENDIX 2

SHORELINE MASTER PROGRAM

City of Bremerton, Washington

Shoreline Permit: A **substantial development**, **conditional use**, revision, or **variance** permit or any combination thereof. [**WAC** 173-14-030(13)]

Shorelines: All of the water areas of the State, including reservoirs and their associated **wetlands**, together with the lands underlying them, except:

1. **Shorelines of state-wide significance** (sub-tidal Puget Sound);

2. **Shorelines on segments of streams** upstream of a point where the mean annual flow is twenty (20) cubic feet per second or less, and the **wetlands** associated with such upstream segments; and

3. **Shorelines on lakes** less than twenty (20) acres in size, and **wetlands** associated with such small lakes.

Shorelines of the State: The total of all **Shorelines** and **Shorelines of Statewide Significance** within the state.

State Master Program: The cumulative total of all **Master Program**s approved or adopted by the Department of Ecology.

Structure: A permanent or temporary edifice or building, or any piece of work artificially built or composed of parts joined together in some definite manner, whether installed on, above, or below the surface of the ground or water, except for **vessel**s. [**WAC** 173-14-03(15)]

Substantial Development: Any **development** of which the total cost or **fair market value**, whichever is higher, exceeds two thousand five hundred dollars ($2,500.00), or any development which materially interferes with the normal public use of the water or **shorelines of the state**.

Exemptions [**RCW** 90.58.030(3e) and **WAC** 173-14-040]:

1. **Normal maintenance or repair of existing structures or developments**, including damage by accident, fire or elements.

   "Normal maintenance" includes those usual acts to prevent a decline, lapse, or cessation from a lawfully established condition.

   "Normal repair" means to restore a **development** to a state comparable to its original condition within a reasonable period after decay or partial destruction except where repair involves total replacement which is

Substantial Development (Cont.)

not common practice or causes substantial adverse effects to the shoreline resource or environment.

2. **Construction of a normal protective bulkhead common to a single-family residence.**

   A **"normal protective" bulkhead** is constructed at or near the ordinary high water mark to protect an existing single family residence and is for protecting land from erosion, not for the purpose of creating land.

   Where an existing bulkhead is being replaced, it shall be constructed no further waterward of the existing bulkhead than is necessary for construction of new footings.

3. **Emergency construction** necessary to protect property from damage by the elements.

   An **"emergency"** is an unanticipated and imminent threat to public health, safety, or the environment which requires immediate action within a time too short to allow full compliance with this **Master Program**.

4. **Construction of a barn or similar agricultural structure on wetlands.** Construction and practices normal or necessary for farming, irrigation, and ranching activities including agricultural service roads and utilities on **wetlands**, and the construction and maintenance of irrigation **structure**s including but not limited to head gates, pumping facilities, and irrigation channels; PROVIDED, that a feedlot of any size, all processing plants, other activities of a commercial nature, alteration of the contour of the wetlands by leveling or filling other than that which results from normal cultivation, shall not be considered normal or necessary farming or ranching activities.

   A **feedlot** shall be an enclosure or facility used or capable of being used for feeding livestock hay, grain, silage, or other livestock feed, but shall not include land for growing crops or vegetation for livestock feeding and/or grazing, nor shall it include normal livestock wintering operations.

5. **Construction or modification of navigational aids** such as channel markers and anchor buoys.

6. **Construction on wetlands by an owner, lessee, or contract purchaser of a single-family residence** for

Substantial Development (Cont.)

his own use or for the use of his family, which residence does not exceed a **height** of thirty-five (35) feet above **average grade level** and which meets all requirements of the state agency or local government having jurisdiction thereof, other than requirements imposed pursuant to this **Master Program**. Construction authorized under this **exemption** shall be located landward of the **ordinary high water mark**. [NOTE: See Table 3-2 Development Standards for additional height limits.]

"Single-family residence" means a detached dwelling designed for and occupied by one family, including those **structure**s and **development** within a contiguous ownership which are a normal appurtenance.

An **"appurtenance"** is necessarily connected to the use and enjoyment of a single-family residence and is located landward of the perimeter of a marsh, bog, or swamp. Normal appurtenances include a garage; deck; driveway; utilities; fences; beach access stairs, ramps or paths for pedestrian use only; boat ramps for the sole use of the private owner; and grading which does not exceed two hundred fifty (250) cubic yards (except to construct a conventional drainfield).

7. **Construction of a dock**, including a community dock, designed for pleasure craft only, for the private, non-commercial use of the owner, lessee, or contract purchaser of single family and multiple family residences, the cost of which does not exceed two thousand five hundred dollars ($2,500.00).

8. **Operation, maintenance, or construction of canals, waterways, drains, reservoirs, or other facilities** that now exist or are hereafter created or developed as a part of an irrigation system for the primary purpose of making use of system waters, including return flow and artificially stored ground water from the irrigation of lands.

9. **The marking of property lines or corners on State-owned lands**, when such marking does not significantly interfere with normal public use of the surface of the water.

10. **Operation and maintenance of any system of dikes, ditches, drains or other facilities** existing on the effective date of the 1975 State Shoreline Management Program which were created, developed or utilized

Substantial Development (Cont.)

primarily as a part of an agricultural drainage or diking system.

11. **Any project with a certification from the Governor** pursuant to chapter 80.50 **RCW**.

Topography, Natural or Existing: The topography of the lot, parcel, or tract of real property immediately prior to any site preparation or grading, including excavation or filling.

Variance: A means to grant relief from the specific bulk, dimensional or performance standards set forth in the **Master Program**, and not a means to vary a use of a shoreline.

Vessel: A ship, boat, barge, or any other floating craft which is designed and used for navigation and does not interfere with the normal public use of the water.

WAC Washington Administrative Code.

Water-Dependent Use: A use or portion of a use which cannot exist in any other location and is dependent on the water by reason of the intrinsic nature of its operations. Examples of water-dependent uses may include cargo terminal loading areas, ferry and passenger terminals, **marina**s, and sewer outfalls.

Water-Related Use: A use or portion of a use which is not intrinsically dependent on a waterfront location but whose operation cannot occur economically without a shoreline location. Examples of water-related uses may include warehousing of goods transported by water, seafood processing plants, or log storage. (Also see **Non-water-oriented Use**.)

Water-Enjoyment Use: A recreational use such as a park, pier, or other use facilitating **public access** as a primary character of the use; or, a use that provides for passive and active interaction of a large number of people with the shoreline for leisure and enjoyment as a general character of the use and which, through location, design and operation, assure the public's ability to interact with the shoreline. In order to qualify as a water-enjoyment use, the use must be open to the public and most if not all of the shoreline oriented space in the facility must be devoted to the specific aspects of the use that foster shoreline interaction.

Water-enjoyment uses include, but are not limited to, restaurants, museums, and mixed-use commercial, provided that such use conforms to the above requirements and the provisions of the **Master Program**.

Wetlands or **Wetlands areas:**

Those lands extending landward for two hundred (200) feet in all directions as measured on a horizontal plane from the **ordinary high-water mark**, and all marshes, bogs, swamps, floodways, river deltas, and flood plains associated with the streams, lakes and tidal waters which are subject to the provisions of this **Master Program**.

APPENDIX 3

20.54.040 DEFINITIONS.

The following definitions are applicable to this chapter:

(a) Nonconforming Lots. A lot that does not meet the lot area, width or street frontage requirements of the zone in which it is located, but was lawfully created prior to the effective date of the zone or subsequent amendments thereto.

(b) Nonconforming Use. Any activity, development or condition that by the zone in which it is located is not permitted outright or as an accessory use, or is not permitted by a conditional use permit or other special permitting process; but was lawfully created prior to the effective date of the zone or subsequent amendments thereto and was continually maintained as defined in this chapter. A nonconforming use may or may not involve buildings or structures and may involve part of or all of a building or property.

(c) Nonconforming Structure. A building or structure that does not comply with the required setbacks, height, lot coverage and other development requirements of the zone in which it is located, but was lawfully constructed prior to the effective date of the zone or subsequent amendments thereto and was continually maintained as defined in this chapter. This term does not apply to any substandard condition that was legally granted a variance.

(d) Substantial Destruction. For the purpose of this chapter, "substantial destruction" means the repair or replacement of a building or structure which exceeds seventy-five (75) percent of the replacement cost of the entire building, excluding the foundations. The replacement cost shall be derived from the market value of the structure or the value as defined by the City's building code, whichever is greater. (Ord. 4950 § 8 (Exh. A) (part), 2005)

20.54.070 NONCONFORMING STRUCTURES.

The following provisions shall apply to all structures and buildings meeting the definition in BMC 20.54.040(c):

(a) Continuation. Any legally established nonconforming structure may be continued until such time that it is discontinued as prescribed in subsection (c) of this section.

(b) Expansion. Buildings may be expanded, provided:

(1) A nonconforming structure may be enlarged, extended or structurally altered, provided the enlargement or alteration complies with the setback, height, lot coverage, and other site development requirements of the zone in which the structure is located.

(2) Structures not conforming to the setback may be expanded by up to twenty (20) percent of the gross floor area and to the building line, provided the enlargements do not further violate setback requirements.

(c) Damage or Destruction. A nonconforming structure experiencing substantial destruction shall be considered discontinued and have its nonconforming status terminated. Any subsequent repair or reconstruction of the structure shall comply with the requirements of the zone.

(d) Partial Damage or Destruction. A nonconforming structure suffering from less than substantial destruction may have its nonconforming status suspended for a time period determined by the Director and be considered conforming for the purpose of improvements and repair, if:

(1) The structure is damaged by fire or other casualty not intentionally caused by the owner or tenant and a complete building permit application is filed within one (1) year of such fire or other casualty; or

(2) A building permit application is submitted prior to partial destruction. The building permit must remain active and if it is allowed to expire, the legal nonconforming status shall terminate and subsequent repairs and improvements shall comply with the requirements of the zone.

(3) In no case shall the nonconformity be allowed to expand.

(e) Repair and Maintenance. Normal repair and maintenance work on a nonconforming structure may be performed that maintains continued safe and sanitary conditions. (Ord. 4971 § 14, 2006; Ord. 4950 § 8 (Exh. A) (part), 2005)

APPENDIX 4

WAC 173-27-040

Developments exempt from substantial development permit requirement.

(1) Application and interpretation of exemptions.

(a) Exemptions shall be construed narrowly. Only those developments that meet the precise terms of one or more of the listed exemptions may be granted exemption from the substantial development permit process.

(b) An exemption from the substantial development permit process is not an exemption from compliance with the act or the local master program, nor from any other regulatory requirements. To be authorized, all uses and developments must be consistent with the policies and provisions of the applicable master program and the Shoreline Management Act. A development or use that is listed as a conditional use pursuant to the local master program or is an unlisted use, must obtain a conditional use permit even though the development or use does not require a substantial development permit. When a development or use is proposed that does not comply with the bulk, dimensional and performance standards of the master program, such development or use can only be authorized by approval of a variance.

(c) The burden of proof that a development or use is exempt from the permit process is on the applicant.

(d) If any part of a proposed development is not eligible for exemption, then a substantial development permit is required for the entire proposed development project.

(e) Local government may attach conditions to the approval of exempted developments and/or uses as necessary to assure consistency of the project with the act and the local master program.

(2) The following developments shall not require substantial development permits:

(a) Any development of which the total cost or fair market value, whichever is higher, does not exceed five thousand dollars, if such development does not materially interfere with the normal public use of the water or shorelines of the state. The dollar threshold established in this subsection must be adjusted for inflation by the office of financial management every five years, beginning July 1, 2007, based upon changes in the consumer price index during that time period. "Consumer price index" means, for any calendar year, that year's annual average consumer price index, Seattle, Washington area, for urban wage earners and clerical workers, all items, compiled by the Bureau of Labor and Statistics, United States Department of Labor. The office of financial management must calculate the new dollar threshold and transmit it to the office of the code reviser for publication in the *Washington State Register* at least one month before the new dollar threshold is to take effect. For purposes of determining whether or not a permit is required, the total cost or fair market value shall be based on the value of development that is occurring on shorelines of the state as defined in RCW 90.58.030 (2)(c). The total cost or fair market value of the development shall include the fair market value of any donated, contributed or found labor, equipment or materials;

(b) Normal maintenance or repair of existing structures or developments, including damage by accident, fire or elements. "Normal maintenance" includes those usual acts to prevent a decline, lapse, or cessation from a lawfully established condition. "Normal repair" means to restore a development to a state comparable to its original condition, including but not limited to its size, shape, configuration, location and external appearance, within a reasonable period after decay or partial destruction, except where repair causes substantial adverse effects to shoreline resource or environment. Replacement of a structure or development may be authorized as repair where such replacement is the common method of repair for the type of structure or development and the replacement structure or development is comparable to the original structure or development including but not limited to its size, shape, configuration, location and external appearance and the replacement does not cause substantial adverse effects to shoreline resources or environment;

(c) Construction of the normal protective bulkhead common to single-family residences. A "normal protective" bulkhead includes those structural and nonstructural developments installed at or near, and parallel to, the ordinary high water mark for the sole purpose of protecting an existing single-family residence and appurtenant structures from loss or damage by erosion. A normal protective bulkhead is not exempt if constructed for the purpose of creating dry land. When a vertical or near vertical wall is being constructed or reconstructed, not more than one cubic yard of fill per one foot of wall may be used as backfill. When an existing bulkhead is being repaired by construction of a vertical wall fronting the existing wall, it shall be constructed no further waterward of the existing bulkhead than is necessary for construction of new footings. When a bulkhead has deteriorated such that an ordinary high water mark has been established by the presence and action of water landward of the bulkhead then the replacement bulkhead must be located at or near the actual ordinary high water mark. Beach nourishment and bioengineered erosion control projects may be considered a normal protective bulkhead when any structural elements are consistent with the above requirements and when the project has been approved by the department of fish and wildlife.

(d) Emergency construction necessary to protect property from damage by the elements. An "emergency" is an unanticipated and imminent threat to public health, safety, or the environment which requires immediate action within a time too short to allow full compliance with this chapter. Emergency construction does not include development of new permanent protective structures where none previously existed. Where new protective structures are deemed by the administrator to be the appropriate means to address the emergency situation, upon abatement of the emergency situation the new structure shall be removed or any permit which would have been required, absent an emergency, pursuant to chapter 90.58 RCW, these regulations, or the local master program, obtained. All emergency construction shall be consistent with the policies of chapter 90.58 RCW and the local master program. As a general matter, flooding or other seasonal events that can be anticipated and may occur but that are not imminent are not an emergency;

(e) Construction and practices normal or necessary for farming, irrigation, and ranching activities, including agricultural service roads and utilities on shorelands, construction of a barn or similar agricultural structure, and the construction and maintenance of irrigation structures including but not limited to head gates, pumping facilities, and irrigation channels: Provided, That a feedlot of any size, all processing plants, other activities of a commercial nature, alteration of the contour of the shorelands by leveling or filling other than that which results from normal cultivation, shall not be considered normal or necessary farming or ranching activities. A feedlot shall be an enclosure or facility used or capable of being used for feeding livestock hay, grain, silage, or other livestock feed, but shall not include land for growing crops or vegetation for livestock feeding and/or grazing, nor shall it include normal livestock wintering operations;

(f) Construction or modification of navigational aids such as channel markers and anchor buoys;

(g) Construction on shorelands by an owner, lessee or contract purchaser of a single-family residence for their own use or for the use of their family, which residence does not exceed a height of thirty-five feet above average grade level and which meets all requirements of the state agency or local government having jurisdiction thereof, other than requirements imposed pursuant to chapter 90.58 RCW. "Single-family residence" means a detached dwelling designed for and occupied by one family including those structures and developments within a contiguous ownership which are a normal appurtenance. An "appurtenance" is necessarily connected to the use and enjoyment of a single-family residence and is located landward of the ordinary high water mark and the perimeter of a wetland. On a statewide basis, normal appurtenances include a garage; deck; driveway; utilities; fences; installation of a septic tank and drainfield and grading which does not exceed two hundred fifty cubic yards and which does not involve placement of fill in any wetland or waterward of the ordinary high water mark. Local circumstances may dictate additional interpretations of normal appurtenances which shall be set forth and regulated within the applicable master program. Construction authorized under this exemption shall be located landward of the ordinary high water mark;

(h) Construction of a dock, including a community dock, designed for pleasure craft only, for the private noncommercial use of the owner, lessee, or contract purchaser of single-family and multiple-family residences. A dock is a landing and moorage facility for watercraft and does not include recreational decks, storage facilities or other appurtenances. This exception applies if either:

(i) In salt waters, the fair market value of the dock does not exceed two thousand five hundred dollars; or

(ii) In fresh waters the fair market value of the dock does not exceed ten thousand dollars, but if subsequent construction having a fair market value exceeding two thousand five hundred dollars occurs within five years of completion of the prior construction, the subsequent construction shall be considered a substantial development for the purpose of this chapter.

For purposes of this section salt water shall include the tidally influenced marine and estuarine water areas of the state including the Pacific Ocean, Strait of Juan de Fuca, Strait of Georgia and Puget Sound and all bays and inlets associated with any of the above;

(i) Operation, maintenance, or construction of canals, waterways, drains, reservoirs, or other facilities that now exist or are hereafter created or developed as a part of an irrigation system for the primary purpose of making use of system waters, including return flow and artificially stored ground water from the irrigation of lands;

(j) The marking of property lines or corners on state-owned lands, when such marking does not significantly interfere with normal public use of the surface of the water;

(k) Operation and maintenance of any system of dikes, ditches, drains, or other facilities existing on September 8, 1975, which were created, developed or utilized primarily as a part of an agricultural drainage or diking system;

(l) Any project with a certification from the governor pursuant to chapter 80.50 RCW;

(m) Site exploration and investigation activities that are prerequisite to preparation of an application for development

authorization under this chapter, if:

(i) The activity does not interfere with the normal public use of the surface waters;

(ii) The activity will have no significant adverse impact on the environment including but not limited to fish, wildlife, fish or wildlife habitat, water quality, and aesthetic values;

(iii) The activity does not involve the installation of any structure, and upon completion of the activity the vegetation and land configuration of the site are restored to conditions existing before the activity;

(iv) A private entity seeking development authorization under this section first posts a performance bond or provides other evidence of financial responsibility to the local jurisdiction to ensure that the site is restored to preexisting conditions; and

(v) The activity is not subject to the permit requirements of RCW 90.58.550;

(n) The process of removing or controlling aquatic noxious weeds, as defined in RCW 17.26.020, through the use of an herbicide or other treatment methods applicable to weed control that are recommended by a final environmental impact statement published by the department of agriculture or the department of ecology jointly with other state agencies under chapter 43.21C RCW;

(o) Watershed restoration projects as defined herein. Local government shall review the projects for consistency with the shoreline master program in an expeditious manner and shall issue its decision along with any conditions within forty-five days of receiving all materials necessary to review the request for exemption from the applicant. No fee may be charged for accepting and processing requests for exemption for watershed restoration projects as used in this section.

(i) "Watershed restoration project" means a public or private project authorized by the sponsor of a watershed restoration plan that implements the plan or a part of the plan and consists of one or more of the following activities:

(A) A project that involves less than ten miles of streamreach, in which less than twenty-five cubic yards of sand, gravel, or soil is removed, imported, disturbed or discharged, and in which no existing vegetation is removed except as minimally necessary to facilitate additional plantings;

(B) A project for the restoration of an eroded or unstable stream bank that employs the principles of bioengineering, including limited use of rock as a stabilization only at the toe of the bank, and with primary emphasis on using native vegetation to control the erosive forces of flowing water; or

(C) A project primarily designed to improve fish and wildlife habitat, remove or reduce impediments to migration of fish, or enhance the fishery resource available for use by all of the citizens of the state, provided that any structure, other than a bridge or culvert or instream habitat enhancement structure associated with the project, is less than two hundred square feet in floor area and is located above the ordinary high water mark of the stream.

(ii) "Watershed restoration plan" means a plan, developed or sponsored by the department of fish and wildlife, the department of ecology, the department of natural resources, the department of transportation, a federally recognized Indian tribe acting within and pursuant to its authority, a city, a county, or a conservation district that provides a general program and implementation measures or actions for the preservation, restoration, re-creation, or enhancement of the natural resources, character, and ecology of a stream, stream segment, drainage area, or watershed for which agency and public review has been conducted pursuant to chapter 43.21C RCW, the State Environmental Policy Act;

(p) A public or private project that is designed to improve fish or wildlife habitat or fish passage, when all of the following apply:

(i) The project has been approved in writing by the department of fish and wildlife;

(ii) The project has received hydraulic project approval by the department of fish and wildlife pursuant to chapter 77.55 RCW; and

(iii) The local government has determined that the project is substantially consistent with the local shoreline master program. The local government shall make such determination in a timely manner and provide it by letter to the project proponent.

Fish habitat enhancement projects that conform to the provisions of RCW 77.55.181 are determined to be consistent with local shoreline master programs, as follows:

(A) In order to receive the permit review and approval process created in this section, a fish habitat enhancement

project must meet the criteria under (p)(iii)(A)(I) and (II) of this subsection:

(I) A fish habitat enhancement project must be a project to accomplish one or more of the following tasks:

• Elimination of human-made fish passage barriers, including culvert repair and replacement;

• Restoration of an eroded or unstable streambank employing the principle of bioengineering, including limited use of rock as a stabilization only at the toe of the bank, and with primary emphasis on using native vegetation to control the erosive forces of flowing water; or

• Placement of woody debris or other instream structures that benefit naturally reproducing fish stocks.

The department of fish and wildlife shall develop size or scale threshold tests to determine if projects accomplishing any of these tasks should be evaluated under the process created in this section or under other project review and approval processes. A project proposal shall not be reviewed under the process created in this section if the department determines that the scale of the project raises concerns regarding public health and safety; and

(II) A fish habitat enhancement project must be approved in one of the following ways:

• By the department of fish and wildlife pursuant to chapter 77.95 or 77.100 RCW;

• By the sponsor of a watershed restoration plan as provided in chapter 89.08 RCW;

• By the department as a department of fish and wildlife-sponsored fish habitat enhancement or restoration project;

• Through the review and approval process for the jobs for the environment program;

• Through the review and approval process for conservation district-sponsored projects, where the project complies with design standards established by the conservation commission through interagency agreement with the United States Fish and Wildlife Service and the natural resource conservation service;

• Through a formal grant program established by the legislature or the department of fish and wildlife for fish habitat enhancement or restoration; and

• Through other formal review and approval processes established by the legislature.

(B) Fish habitat enhancement projects meeting the criteria of (p)(iii)(A) of this subsection are expected to result in beneficial impacts to the environment. Decisions pertaining to fish habitat enhancement projects meeting the criteria of (p)(iii)(A) of this subsection and being reviewed and approved according to the provisions of this section are not subject to the requirements of RCW 43.21C.030 (2)(c).

(C)(I) A hydraulic project approval permit is required for projects that meet the criteria of (p)(iii)(A) of this subsection and are being reviewed and approved under this section. An applicant shall use a joint aquatic resource permit application form developed by the office of regulatory assistance to apply for approval under this chapter. On the same day, the applicant shall provide copies of the completed application form to the department of fish and wildlife and to each appropriate local government. Local governments shall accept the application as notice of the proposed project. The department of fish and wildlife shall provide a fifteen-day comment period during which it will receive comments regarding environmental impacts. Within forty-five days, the department shall either issue a permit, with or without conditions, deny approval, or make a determination that the review and approval process created by this section is not appropriate for the proposed project. The department shall base this determination on identification during the comment period of adverse impacts that cannot be mitigated by the conditioning of a permit. If the department determines that the review and approval process created by this section is not appropriate for the proposed project, the department shall notify the applicant and the appropriate local governments of its determination. The applicant may reapply for approval of the project under other review and approval processes.

(II) Any person aggrieved by the approval, denial, conditioning, or modification of a permit under this section may formally appeal the decision to the hydraulic appeals board pursuant to the provisions of this chapter.

(D) No local government may require permits or charge fees for fish habitat enhancement projects that meet the criteria of (p)(iii)(A) of this subsection and that are reviewed and approved according to the provisions of this section.

[Statutory Authority: RCW 90.58.030 (3)(e), 90.58.045,90.58.065 , 90.58.140(9), 90.58.143, 90.58.147, 90.58.200,90.58.355 , 90.58.390, 90.58.515, 43.21K.080, 71.09.250,71.09.342 , 77.55.181, 89.08.460, chapters 70.105D, 80.50 RCW. 07-02-086 (Order 05-12), § 173-27-040, filed 1/2/07, effective 2/2/07. Statutory Authority: RCW 90.58.140(3) and[90.58].200 . 96-20-075 (Order 95-17), § 173-27-040, filed 9/30/96,

effective 10/31/96.]

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION II

CITY OF BREMERTON Appellant, v. WEBG, LLC, Respondent.	No. 36003-9-II DECLARATION OF SERVICE

Helen M. Stubbert declares as follows:

I am a legal assistant to Patrick J. Schneider, and I have personal knowledge of the facts in this declaration and am competent to testify thereto.

I hereby certify that, on May 11, 2007, I caused a true and correct copy of Appellant's Opening Brief, and this Declaration of Service to be served on the following, in the manner indicated:

William Broughton Broughton & Singleton, PS 9057 Washington Avenue N.W. Silverdale, WA 98383	[X] By U.S. Mail, First Class Postage Prepaid [X] Via E-Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington this 11th day of May, 2007.

Helen M. Stubbert

ORIGINAL